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No. 95-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ERNST & YOUNG LLP,
Petitioner,

v.

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Rhode Island

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court below erred in holding that a retroactive state statute did not violate Ernst & Young's right to due process under the Fourteenth Amendment, where (a) the statute deprived Ernst & Young of an existing right to contribution recognized as a property interest under state law, (b) the statute weakened Ernst & Young's position in pending litigation with a state entity, and (c) the state entity's stated purpose in seeking passage of the statute was to pressure Ernst & Young to settle the litigation.

2. Whether the court below erred in holding that the same retroactive statute did not violate Ernst & Young's right to due process, even though the statute, as interpreted by the state courts, failed to provide Ernst & Young a meaningful opportunity to participate in settlement approval hearings affecting its rights.

PARTIES TO THE PROCEEDINGS

Petitioner Ernst & Young LLP was a third-party defendant in the proceeding below. Edward T. Broadmeadow, Alfred J. Corso, Larry D. Davidson, Stephen B. Forman, Robert R. Fournier, Geoffrey B. Hopper, Keith R. Phillips, and Michael A. Rizzo — all present or former partners or employees of Ernst & Young LLP — were also third-party defendants below.

Respondents Rhode Island Depositors Economic Protection Corporation and Edward D. Pare, Jr., Receiver of Brown University Employees Credit Union, were plaintiffs below.

Respondents Wilhemina Brown, George R. Cabral, Don Desrochers, Patricia J. Dodd, Walter Feldman, Douglas Figueiredo, Judy A. Lux, Robert Santilli, Michael Sheehan, Anthony Tanzi, Dorothy Testa, Debra Viau, John Doe and Jane Doe, former officers and directors of Brown University Employees Credit Union, were defendants and third-party plaintiffs below.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF RHODE ISLAND

Petitioner Ernst & Young LLP respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Rhode Island.

OPINIONS BELOW

The opinion of the Supreme Court of Rhode Island (App., *infra*, 1a) is reported at 659 A.2d 95. The opinion and order of the trial court (App., *infra*, 21a, 26a) are unreported.

JURISDICTION

The judgment of the Supreme Court of Rhode Island was entered on May 19, 1995 (App., *infra*, 1a).[1] The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

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[1] By order of Justice Souter, Ernst & Young's time within which to file a petition for a writ of certiorari was extended to and including September 15, 1995.

STATUTORY PROVISIONS INVOLVED

Section 42-116-40 of the Rhode Island General Laws, P.L. 1993, ch. 85, § 1, provides in relevant part:

> Notwithstanding any provisions of law to the contrary, a person, corporation, or other entity who has resolved its liability to the Rhode Island Depositors' Economic Protection Corporation, the receiver of Rhode Island Share and Deposit Indemnity Corporation or the receiver of any state-chartered financial institution in a judicially approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any other joint tortfeasors unless its terms so provide, but it reduces the potential liability of such joint tortfeasors by the amount of the settlement.
>
> The provisions of this section shall apply solely and exclusively to settlements of liabilities to the Rhode Island Depositors' Economic Protection Corporation, the receiver of the Rhode Island Share and Deposit Indemnity Corporation and the receiver of any other state-chartered financial institution and shall not be construed to amend or repeal the provisions of chapter 6 of title 10 relating to contributions among joint tortfeasors, other than as specifically provided herein.

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides in relevant part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

STATEMENT

In 1992, respondent Rhode Island Depositors Economic Protection Corporation ("DEPCO"), an instrumentality of the

State of Rhode Island, sued petitioner Ernst & Young for losses arising out of the failure of Rhode Island's credit union system. In the course of that lawsuit, after Ernst & Young resisted DEPCO's settlement demands, DEPCO's lawyers drafted and convinced the state legislature to enact a statute (the "Act"), applicable only in narrow circumstances, that retroactively deprived Ernst & Young of its right to seek contribution from parties who enter into settlements with DEPCO. The Act also provided that any settlement between DEPCO and other parties would reduce Ernst & Young's potential liability only by the settlement amount (i.e., *pro tanto*), rather than in proportion to the settling party's share of the fault. The stated purpose of DEPCO's counsel in seeking passage of the Act was to pressure Ernst & Young to settle the lawsuit brought by DEPCO.

In the present action, the Rhode Island Supreme Court held that the Act did not violate various provisions of the federal and Rhode Island constitutions. Of particular relevance here, the court concluded that the Act did not violate Ernst & Young's Fourteenth Amendment right to due process of law. In doing so, the court expressly recognized that its holding conflicted with a decision of the Supreme Court of Virginia.

1. Background Of DEPCO And The Credit Unions

On January 1, 1991, the governor of Rhode Island proclaimed a banking emergency and ordered the closing of the Rhode Island Share and Deposit Indemnity Corporation ("RISDIC") and the credit unions it insured. Responding to the effects of this "credit union crisis," the Rhode Island General Assembly enacted legislation creating DEPCO. As a public corporation, DEPCO was charged with the payment of the deposit liabilities of the failed credit unions, the liquidation of their assets, and the pursuit of tortfeasors who contri-

buted to the failure of the credit union system. (App., *infra*, 3a.) DEPCO succeeded in repaying with interest virtually all of the affected deposits, and in mid-1992, Rhode Island's governor announced that the banking emergency had ended.

2. DEPCO's Lawsuit Against Ernst & Young

Ernst & Young had provided certain audit and accounting services to RISDIC and to some of the credit unions. On February 20, 1992, DEPCO filed a lawsuit charging Ernst & Young with negligence, negligent misrepresentation, and breach of contract in connection with those services. (App., *infra*, 4a.)

DEPCO's counsel has made public statements branding Ernst & Young as an opponent of the people and a "deep pocket" from which a large settlement should be extracted. Rhode Island's former governor, who also served as chairman of DEPCO, publicly asserted that Ernst & Young is culpable and that Ernst & Young would not be willing to go to trial before a Rhode Island jury. (Affidavit of William P. Hammer, Jr. ("Hammer Aff.") ¶¶ 13-15 & Exhibit D, submitted in the proceedings below.)

3. Rhode Island's Prior Law Of Contribution

When DEPCO began its lawsuit against Ernst & Young, the law in Rhode Island concerning the effect of a settlement on a non-settling party's right to contribution was the same for all types of claims. The basic rule, in effect since 1940, was that a settlement by one joint tortfeasor did not impair a non-settling defendant's right to seek contribution from that tortfeasor. However, a settling party could be shielded from claims for contribution if the settlement explicitly released non-settling defendants from liability for the settling tortfeasor's proportionate share of any judgment. *See* R.I. Gen. Laws §§ 10-6-7, 10-6-8 and 10-6-11.

This framework provided protection for both settling and non-settling defendants. Non-settling defendants were protected against "the injustice of having one joint tortfeasor pay more than his or her fair share of damages," *Wilson v. Krasnoff*, 560 A.2d 335, 339 (R.I. 1989), because they either received a reduction in their potential liability equal to the settling party's share of the fault, or could seek contribution from the settling party for any portion of a judgment exceeding their fair share. At the same time, settling parties could be protected from the uncertainties of future contribution claims so long as the settlement agreement provided a proportionate share release for non-settling parties.

4. The Act's New Contribution Scheme

Rather than proceeding under the existing framework, DEPCO determined that the law should be changed so that Ernst & Young, which had refused DEPCO's settlement demands, would be deprived of the protections afforded by the existing law. To accomplish this goal, DEPCO's trial counsel in the malpractice action against Ernst & Young drafted the Act. The governor of Rhode Island (who was also chairman of DEPCO) introduced the Act in the General Assembly, and both the governor and DEPCO's trial counsel lobbied extensively for it. On July 13, 1993, DEPCO's chairman — wearing his governor's hat — signed the Act into law.

The Act (now codified as R.I. Gen. Laws § 42-116-40) retroactively extinguished Ernst & Young's right to pursue contribution from parties who settle with DEPCO. Moreover, the Act provides that any judgment assessed against Ernst & Young will be reduced not by the settling parties' proportionate share of the losses, but only by the amounts paid in settlement — a so-called *pro tanto* reduction. The Act applies only to claims brought by DEPCO and by receivers for Rhode Island-chartered financial institutions. In all

other cases, Rhode Island's traditional rule requiring proportionate fault releases (or leaving settling parties liable for contribution) remains in effect. The Act was amended during its passage through the legislature to make this clear.

By its terms, the Act only bars contribution claims against parties who have entered into "good faith" settlements that have been approved by a court. As interpreted by the Rhode Island courts, however, the Act — unlike similar *pro tanto* schemes that have been noted by this Court — does not require a settling defendant to show that the settlement is a "fair forecast of its equitable share of the judgment." *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1468-1469 (1994) (discussing *pro tanto* schemes). *See DEPCO v. Brown*, Nos. 94-668, 94-716 and 94-720, slip op. at 4 (R.I. July 14, 1995) [hereinafter *Brown Settlement Appeal*]. Under the Act, a settlement may receive court approval, and may thus protect a settling party from contribution claims, even if it is grossly inadequate in comparison to the settling party's true share of the fault.

5. The Harm To Ernst & Young

The Act places non-settling parties — and Ernst & Young in particular — at a severe disadvantage compared to the prior law. Under the Act's *pro tanto* approach, a non-settling party may be forced to absorb the difference between the damages caused by a settling party and whatever amount DEPCO accepts from that party in settlement, no matter how insignificant, or how disproportionate to the settling party's fault, that amount may be. Thus, the Act permits DEPCO to settle cheaply with certain parties — even those responsible for directing the affairs of the failed institutions, such as the Rhode Islanders who served on the boards of directors of RISDIC and the credit unions — while leaving Ernst & Young liable not only for its own share of the fault (if any),

but for the settling parties' share as well. Unless Ernst & Young accedes to DEPCO's settlement demands, Ernst & Young faces the prospect of bearing the brunt of liability for the entire RISDIC collapse, even though, as an independent accounting firm, it took no part in managing or operating any of the institutions in question.

These effects were precisely what DEPCO intended. In shepherding the Act through the legislature, DEPCO's trial counsel made it clear that the Act's purpose was to force Ernst & Young into a settlement of the lawsuit brought by DEPCO. (Hammer Aff. ¶ 8.) During legislative hearings on the Act, he argued that the law should be changed only in his litigation to benefit his client. (Hammer Aff. ¶ 14.)[2] Although the Rhode Island legislature does not maintain an official legislative history, it was a matter of public knowledge that Ernst & Young was the party "targeted" by the Act. *See* Mark Dubnoff, *Accounting Firm Sues DEPCO Over New Bailout Law*, Newport Daily News, July 29, 1993, at C6; Editorial, Providence Business News, July 5, 1993, at 18.

6. Proceedings Below

a. The Federal Court Challenge

Two weeks after the Act became law, Ernst & Young challenged the Act in federal court. Ernst & Young contended, *inter alia*, that the Act violated its Fourteenth

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[2] Although the Rhode Island Supreme Court's opinion did not address these statements alleged by Ernst & Young (and supported by affidavit), DEPCO's counsel has not denied making them. DEPCO's counsel did at one point suggest that Ernst & Young had somehow "mischaracterized" his statements, but he never elaborated on that charge and, notably, did not offer any evidence to rebut the affidavit submitted by Ernst & Young on the issue. *See* Reply Brief of Governor Sundlun, *et al.* at 11, filed in the proceedings below.

Amendment right to due process because it deprived Ernst & Young of an existing right to contribution and was intended to pressure Ernst & Young into settling the DEPCO lawsuit. DEPCO moved to dismiss the complaint on grounds of ripeness and abstention. The district court granted DEPCO's motion. The First Circuit affirmed, solely on ripeness grounds. *Ernst & Young v. DEPCO*, 45 F.3d 530 (1st Cir. 1995).

b. The Settlement With Officers And Directors

In November 1994, DEPCO filed a motion in the Superior Court of Rhode Island seeking court approval of a proposed settlement (the "Brown Settlement") with the officers and directors of one of the failed credit unions. In connection with that motion — even while continuing to urge in the federal proceeding that Ernst & Young's claims were not ripe — DEPCO sought a ruling from the Rhode Island Supreme Court on the same issues, including the due process claim, that Ernst & Young had raised in its federal lawsuit. The Superior Court approved the settlement and certified the constitutional issues to the Rhode Island Supreme Court. (App., *infra*, 26a-27a.)

Ernst & Young appealed from the court's approval of the settlement, arguing that the Superior Court had erred in interpreting the Act in a manner that did not require Ernst & Young, as a non-settling party, to be provided with a meaningful opportunity to participate in the settlement approval process. The Supreme Court affirmed the approval of the settlement, rejecting Ernst & Young's contention that the Act had been misinterpreted by the lower court. *Brown Settlement Appeal*, *supra*, at 4.[3]

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[3] Although the current proceeding and the *Brown Settlement Appeal* arose out of the same Superior Court order, the Rhode Island Supreme Court determined that Ernst & Young's challenge to the merits of the

c. The Decision On The Constitutional Issues

In briefing before the Rhode Island Supreme Court, Ernst & Young contended that the Act violated Ernst & Young's due process rights because, by changing the contribution rules in the middle of DEPCO's lawsuit against Ernst & Young, the Act retroactively deprived Ernst & Young of a pre-existing property interest recognized by Rhode Island law. Ernst & Young also argued that the Act deprived it of due process because the Act, as interpreted by the Superior Court (and later by the Rhode Island Supreme Court as well), did not provide a meaningful opportunity for Ernst & Young to participate in the settlement approval process.

On May 19, 1995, the Rhode Island Supreme Court issued an opinion rejecting Ernst & Young's constitutional challenge to the Act.[4] On the issue of due process, the court agreed with Ernst & Young that the Act had retroactively deprived Ernst & Young of a recognized property interest. However, the court concluded that the Act was consistent with due process because it facilitated settlements and therefore furthered the purpose of minimizing the potential liability of Rhode Island taxpayers. (App., *infra*, 15a-16a.) In reaching its decision, the court expressly declined to follow the decision of the Supreme Court of Virginia in *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984), in which

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settlement (which raised issues of interpretation of state law) and the certified questions (which raised issues of federal and state constitutional law) should be briefed and decided separately. As a result, no federal issues were raised or decided in the *Brown Settlement Appeal*.

[4] The Superior Court had certified to the Supreme Court questions concerning the constitutionality of the Act under the due process, equal protection, and bill of attainder clauses of the federal Constitution as well as the due process, equal protection and contract clauses of the Rhode Island constitution.

that court held that the retroactive abrogation of a right to contribution and imposition of a *pro tanto* liability scheme would violate due process. (App., *infra*, 14a-15a.)

REASONS FOR GRANTING THE PETITION

In this case, the Rhode Island Supreme Court held that it is consistent with due process for a state entity (DEPCO), the state's governor (DEPCO's chairman), and the state legislature to take action retroactively depriving a private party (Ernst & Young) of a legal right recognized as a property interest under state law, thereby advancing the state entity's announced goal of weakening the position of that private party in pending litigation with the state entity. In effect, the court held that a state may change the rules in the middle of litigation between the state and a private party in order to improve the state's own position in the lawsuit. To our knowledge, no American court outside Rhode Island has ever endorsed this kind of blatant attempt by a governmental party to a lawsuit to "rig the rules" in its favor.

As this Court has recognized, retroactive laws should be reviewed with special care because of the potential for unfairness. Such a review in this case makes clear that the Act's retroactive application is devoid of any rational basis or legitimate purpose. Rather, the Act's alteration of the liability scheme applicable to Ernst & Young in DEPCO's lawsuit represents a naked exercise of governmental power far removed from the general economic or social legislation that is entitled to a presumption of constitutionality. Simply put, the Act violates one of our most fundamental notions of fair process: a participant in a contest in court does not have the right to change the rules in the middle of the contest, for no better reason than to advance its own position.

This Court should grant certiorari to make clear that Rhode Island — in its zeal to save money by making a predominantly out-of-state firm pick up the tab for its "credit union crisis" — has gone too far. Certiorari should also be granted because the decision below conflicts with the Supreme Court of Virginia's decision in *Shiflet v. Eller* holding that the retroactive abrogation of a right to contribution violates due process, as well as with federal court decisions holding that non-settling parties whose rights are affected under a *pro tanto* set-off scheme have a due process right to meaningful participation in settlement approval proceedings.

I. THE DECISION OF THE RHODE ISLAND SUPREME COURT IS ERRONEOUS BECAUSE THE ACT'S RETROACTIVE DEPRIVATION OF ERNST & YOUNG'S RIGHT TO CONTRIBUTION LACKS A RATIONAL BASIS.

A. Retroactive Legislation Should Be Viewed With Skepticism And Must Have A Rational Basis.

Retroactive legislation such as the Act has long been viewed with considerable suspicion. Indeed, "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." *Landgraf v. USI Film Prods.*, 114 S. Ct. 1483, 1497 (1994). As Justice Scalia has noted:

> The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal. It was recognized by the Greeks . . . by English common law . . . and by the Code Napoleon. It has long been a solid foundation of American law. . . . Justice Story said that "retrospective laws are . . . generally unjust; and . . . neither accord with

> sound legislation nor with the fundamental principles of the social compact." 2 J. Story, Commentaries on the Constitution § 1398 (2d ed. 1851).

Kaiser Aluminum & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855-856 (1990) (Scalia, J., concurring). *See also Dash v. Van Kleeck*, 7 Johns. 477, 506 (N.Y. Sup. Ct. 1811) (Opinion of Kent, C.J.) ("There has not been, perhaps, a distinguished jurist . . . , within the last two centuries, who has had occasion to take notice of retrospective laws . . . but has mentioned them with caution, distrust or disapprobation.").

Modern courts — including this Court — have been equally skeptical of retroactive statutes. Just last year, in *Landgraf*, this Court noted that retroactive statutes "raise particular concerns":

> The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.

Landgraf, 114 S. Ct. at 1497. *See also General Motors Corp. v. Romein*, 503 U.S. 181, 191 (1992) ("problems of unfairness" are "more serious" for retroactive laws than for prospective ones).

To be consistent with due process, a retroactive statute — like any statute — may not abrogate a property interest unless that action is, at a minimum, justified by a legitimate governmental purpose furthered by rational means. *Pension Benefit Guar. Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 730 (1984). Because of the careful scrutiny that must be afforded to retroactive legislation, however, "a justification sufficient to validate a statute's prospective application under the [due process

clause] 'may not suffice' to warrant its retroactive application." *Landgraf*, 114 S. Ct. at 1497 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 17 (1976)). Not only the statute in general, but also the retroactive effect of the statute in particular, must satisfy the demands of due process.

B. The Court Below Erred In Holding That The Act Has A Rational Basis Because It Facilitates Settlements.

In this case, the court below determined, as a matter of Rhode Island law, that the Act had retroactive effect and deprived Ernst & Young of a property interest recognized by state law. However, the court concluded that the Act was consistent with due process because it rationally furthered the goal of "facilitating settlement of the DEPCO litigation" and therefore "minimizing the taxpayers' liability." (App., *infra*, 15a-16a; *see also* App., *infra*, 9a.) In holding that this purported purpose was sufficient to support the Act, the court below erred.

1. *This Court Has Noted That* Pro Tanto *Set-Off Schemes Such As The Act Do Not Promote Settlements And Are Unfair.*

As this Court has recognized, the notion that *pro tanto* set-off schemes such as the one established by the Act are more effective than proportionate fault rules in facilitating the resolution of disputes is a myth. In *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461 (1994), this Court rejected the *pro tanto* approach in favor of a proportionate share rule for admiralty cases. This Court concluded that "the *pro tanto* rule has no clear advantage in promoting settlements" because, under both the *pro tanto* and proportional fault set-off rules, "[t]he parties' desire to avoid litigation costs, to reduce uncertainty, and to maintain ongoing commercial relation-

ships is sufficient to ensure nontrial dispositions in the vast majority of cases." *Id.* at 1468-1469.

Notably, this Court also found that the *pro tanto* rule *"comes at too high a price in unfairness." Id.* at 1469 (emphasis added). The potential for unfairness under the Act is even greater than that noted in *McDermott*. The Act, unlike the *pro tanto* schemes discussed in *McDermott*, does not require that a proposed settlement bear any reasonable relationship to the settling party's actual share of the fault. *See* pp. 5-6, *supra*. Moreover, the schemes discussed in *McDermott*, unlike the Act, were not "targeted" at a specific party or a particular lawsuit. *See* pp. 6-7, *supra*.

2. *The Explanations Offered Below As To How The Act Facilitates Settlements Are Invalid.*

The Rhode Island Supreme Court did not attempt to explain how, notwithstanding this Court's decision in *McDermott*, the Act might rationally be expected to facilitate settlement of the DEPCO litigation. However, parties and *amici* in the proceedings below offered three separate theories. First, all of the parties supporting the Act argued that the Act could encourage parties sued by DEPCO to settle by protecting settling defendants from contribution claims. Second, DEPCO argued that the Act would encourage DEPCO itself to settle by making settlements less risky and potentially less expensive for DEPCO. Third, one of the *amici* below suggested that the Act would encourage settlement by exposing a non-settling party (i.e., Ernst & Young) to the threat of liability in excess of the party's proportionate share. *See Amicus Curiae* Brief on Behalf of Certain Officers and Staff of Rhode Island Central Credit Union at 14, filed in the proceedings below. None of these proffered justifications for the Act withstands scrutiny.

The "Contribution Protection" Argument. There is no rational relationship between the Act and the purported goal of facilitating settlements by protecting settling parties from contribution claims. As noted above, the Act's *pro tanto* set-off scheme has no clear advantage in promoting settlements. *See* pp. 13-14, *supra*. Moreover, DEPCO has always had the power to provide contribution protection by indemnifying settlors or by granting non-settling parties a proportionate fault release. Thus, the Act does not provide settling parties with any protection that DEPCO could not have provided under the previous law.

The "Cheaper Settlements for DEPCO" Argument. DEPCO argued below that even if it could have settled cases without the Act by granting proportionate fault releases, it did not want to grant such releases because it could not determine the value of what it would be giving up. *See* Brief of Governor Sundlun, *et al.* at 5-6, filed in the proceedings below. Under the Act, by contrast, DEPCO could settle cases with other parties for any amount — no matter how paltry in relation to the settling party's actual liability — without giving up anything, because the "deep pocket" of Ernst & Young could be tapped for any shortfall. Thus, DEPCO contended that the Act has a rational basis because it makes settlements less costly (and therefore more attractive) for the state, even though it does so at Ernst & Young's expense.

The notion that a state may justify the abrogation of a private party's property interest by claiming that such a step was needed to encourage the *state itself* to change its behavior is novel, to say the least: we are aware of no support for such a proposition in this or any other court outside Rhode Island. Further, it is difficult to see how the Act could be considered rational if, as DEPCO suggests, its aim is to encourage DEPCO to enter into settlements even when DEP-

CO cannot determine whether the settlements are fair and adequate in relation to the parties' share of the fault.

Nor can the possibility that the Act could benefit the state economically (at Ernst & Young's expense) justify the retroactive abrogation of Ernst & Young's right to contribution in the course of a pending lawsuit brought by a state entity. If it were, the requirement of a legitimate purpose furthered by rational means would be essentially meaningless: virtually any governmental appropriation of a property interest may enrich the government to some extent. Where rules affecting litigation between the government and private parties are at stake, more is needed to justify tilting the playing field in the government's favor than the mere notion that doing so will save the government money. *Cf. O'Melveny & Myers v. FDIC*, 114 S. Ct. 2048, 2055 (1994) (rejecting government's argument that ability to obtain "more money" justified special government rights in litigation); *TBG, Inc. v. Bendis*, 36 F.3d 916, 925 (10th Cir. 1994) ("To the extent there is tension between the goal of promoting settlements and fundamental fairness to litigants, the latter must prevail.") (quoting *United States Fidelity & Guar. Co. v. Patriot's Point Dev. Auth.*, 772 F. Supp. 1565, 1575 (D.S.C. 1991)).

The "Excessive Liability" Argument. Undoubtedly, the real purpose of the Act was the one suggested by one of the *amici* below: to coerce Ernst & Young, the only national "deep pocket" sued by DEPCO, into settling with DEPCO by changing the law of contribution so as to expose Ernst & Young to the threat of enormous and disproportionate liability. Singling out Ernst & Young for special pressure was the purpose stated by DEPCO's counsel in lobbying for the Act, and the one recognized by the news media at the time. *See* p. 7, *supra*. But as with the argument that the Act would encourage DEPCO to settle, a *real* purpose is not the same thing as a *legitimate* purpose. There is nothing even remotely

legitimate about rigging the rules in a manner that disadvantages Ernst & Young in pending litigation with the state.

Last year, in *United States v. Carlton*, 114 S. Ct. 2018 (1994), this Court considered the constitutionality of a federal statute retroactively limiting the availability of a tax deduction. The Court upheld the statute against a due process challenge, but did so only after expressly noting that "[t]here was no plausible contention that Congress acted with an improper motive, such as by targeting" certain taxpayers for unfair treatment. *Id.* at 2023. The clear implication was that if Congress *had* acted with an improper motive, the Court's conclusion might well have been different. Even though the statute still would have served the legitimate goal of raising money for the government, it would have done so in an illegitimate manner.

This case is precisely the kind of case that the Court contemplated in *Carlton*. Here, there is every indication that the state of Rhode Island did act with the improper motive of targeting Ernst & Young and, specifically, of pressuring Ernst & Young to settle. Such targeting and pressure cannot constitute a rational means of furthering a legitimate purpose. Rhode Island may no more deprive Ernst & Young of a property interest and thereby coerce Ernst & Young to settle the DEPCO lawsuit than it could subject a criminal defendant to a game of Russian Roulette in order to coerce the defendant to plead guilty. In either case, even if capitulation by the defendant would benefit the state, the means employed to achieve that end would be patently irrational and improper, and therefore inconsistent with due process.

In sum, the Act's retroactive deprivation of Ernst & Young's right to contribution represents a direct interference with Ernst & Young's right to fair process in the DEPCO litigation, and is not rationally related to any legitimate pur-

pose. The Act therefore violates Ernst & Young's right to due process under the Fourteenth Amendment.

II. THE DECISION BELOW CONFLICTS WITH A VIRGINIA SUPREME COURT DECISION HOLDING THAT A RETROACTIVE DEPRIVATION OF AN EXISTING RIGHT TO CONTRIBUTION VIOLATES DUE PROCESS.

The Rhode Island Supreme Court's decision in this case is in direct conflict with the decision of the Supreme Court of Virginia in *Shiflet v. Eller*. *Shiflet* held that applying a state statute retroactively so as to deprive a party of an existing right of contribution would violate due process.

The parties in *Shiflet* had been involved in an automobile accident in 1977. In 1979, Virginia enacted a statute that, like the Act at issue here, barred non-settling parties from seeking contribution from settling parties, but provided for a *pro tanto* reduction in the non-settling parties' liability. In Virginia, as in Rhode Island, a claim for contribution arises at the time of the underlying tort. *See Shiflet*, 228 Va. at 121, 319 S.E.2d at 754; *Nelson v. Ptaszek*, 505 A.2d 1141, 1143 (R.I. 1986); App., *infra*, 12a. Thus, claims for contribution arising out of the automobile accident had arisen in 1977, two years before the statute at issue was enacted.

The *Shiflet* court held that the statute in question could not be applied retroactively to impair a party's pre-existing cause of action for contribution. The court stated: "*Such a retroactive application of the enactment would violate [the party's] due process rights* and would be invalid." *Shiflet*, 228 Va. at 121, 319 S.E.2d at 754 (emphasis added) (citing, *inter alia*, *Carickhoff v. Badger-Northland, Inc.*, 562 F. Supp. 160, 164-165 (W.D. Va. 1983) (holding that the retroactive abrogation of a contribution right violated the federal due process clause)). *See also Potomac Hosp. Corp. v. Dillon*,

229 Va. 355, 360, 329 S.E.2d 41, 44-45 (noting the holding in *Shiflet* that retroactive application of a statute adversely affecting an existing right of contribution "violates due process and is therefore unconstitutional"), *cert. denied*, 474 U.S. 971 (1985).[5]

Shiflet makes clear that if Virginia enacted a statute identical to the Act, and with the same effect upon Ernst & Young, that statute would be considered a violation of due process and would therefore be held unconstitutional. Here, in contrast, the Rhode Island Supreme Court rejected Ernst & Young's due process argument and held that the Act was valid, expressly declining to follow *Shiflet*. As a result, the Act has been found to be constitutional even though an identical statute in Virginia would not be. This Court should resolve the conflict.

III. THE DECISION BELOW CONFLICTS WITH FEDERAL DECISIONS HOLDING THAT NON-SETTLING PARTIES HAVE A DUE PROCESS RIGHT TO MEANINGFUL PARTICIPATION IN SETTLEMENT PROCEEDINGS.

Finally, this Court should grant certiorari to resolve a conflict in the courts concerning the due process right of a non-settling party to participate in settlement approval proceedings involving other parties. Ernst & Young contended below that the Act, as interpreted by the Superior Court (and later by the Rhode Island Supreme Court as well),

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[5] Although the *Shiflet* court did not explicitly state that its decision was based on the due process clause of the Fourteenth Amendment, as opposed to that of the Virginia Constitution, the Virginia clause is interpreted as being co-extensive with the Fourteenth Amendment provision. *See, e.g., Leftwich v. Bevilacqua*, 635 F. Supp. 238, 243 (W.D. Va. 1986).

violated due process, not only for the reasons noted above, but also because the Act did not afford Ernst & Young an opportunity for meaningful participation in such settlement proceedings affecting its rights.[6] The Rhode Island Supreme Court's failure to accept that contention conflicts with the holdings of several federal courts.

A. In Circumstances Such As Those In This Case, Federal Courts Have Held That Non-Settling Parties Have A Right To Meaningful Participation In Settlement Approval Proceedings.

Because the Act bars non-settling parties such as Ernst & Young from seeking contribution from parties who have settled with DEPCO — and provides for only a *pro tanto* set-off — non-settling parties have a clear interest in ensuring that DEPCO's settlements with other parties are reasonable. In circumstances such as these, a number of federal courts have held that non-settling parties must be afforded a meaningful opportunity to participate in settlement approval proceedings. *See, e.g., In re Masters Mates & Pilots Pension Plan*, 957 F.2d 1020, 1031 (2d Cir. 1992) ("third party participation in an evidentiary fairness hearing" is "necessary to protect the due process rights of third parties"); *In re Jiffy Lube Sec. Litig.*, 927 F.2d 155, 160 n.3 (4th Cir. 1991) (contribution bar "exposes the non-settling defendant to liability for any deficiency in the judgment, so a hearing focussing on fairness of the settlement to the non-settling defendant is required").

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[6] In the separate *Brown Settlement Appeal*, Ernst & Young also contended that the Superior Court had misinterpreted the Act as a matter of state law. The Rhode Island Supreme Court rejected that contention, *see* p. 8, *supra*, and Ernst & Young does not challenge that holding here.

Under these federal court decisions, when third parties object to a settlement, federal courts must "at least evaluate [their] contentions" and "provide [them] with an opportunity for meaningful exposition of their positions." *Girsh v. Jepson*, 521 F.2d 153, 160 (3d Cir. 1975) (disapproving settlement where third party was denied meaningful participation in fairness hearing). In doing so, the courts consider, *inter alia*, whether the settling parties made "a good faith effort to evaluate the settling defendant's proportional liability," *see In re Del-Val Fin. Corp. Sec. Litig.*, 868 F. Supp. 547, 559 (S.D.N.Y. 1994); they may hear testimony on that issue and receive deposition transcripts and documentary evidence from the non-settling party. *See Bragger v. Trinity Capital Enter. Corp.*, No. 92 Civ. 2124, 1993 U.S. Dist. LEXIS 10087, at *6 (S.D.N.Y. July 23, 1993). Such participation by non-settling parties guards against the prospect that a plaintiff will accept inadequate settlements from one or more tortfeasors so long as a perceived "deep pocket" remains liable. *Cf. Gomes v. Brodhust*, 394 F.2d 465, 468 (3d Cir. 1967) (*pro tanto* rule leaves "the field of settlement very much open to collusive arrangements between a plaintiff and a favored joint tortfeasor").

B. As Interpreted By The Rhode Island Courts, The Act Does Not Afford Non-Settling Parties A Right To Meaningful Participation In Settlement Approval Proceedings.

As interpreted by the Rhode Island courts, the Act does not afford non-settling parties an opportunity to participate in a meaningful way in the settlement approval process. The Rhode Island courts' approval of a recent settlement between DEPCO and the officers and directors of one of the failed credit unions makes this clear.

When notified of the proposed settlement, Ernst & Young objected because neither it nor the trial court had sufficient basic information upon which to evaluate the adequacy of the settlement and its effect on third parties. The motion for approval of the settlement was filed just two weeks after the filing of the complaint by DEPCO against the officers and directors, and less than one week after Ernst & Young was sued as a third-party defendant. The complaint and third-party complaint contained only conclusory allegations that provided virtually no information regarding the nature or extent of the parties' relative fault or the total damages sought. Moreover, the settling parties offered no evidence concerning the resources of the settling defendants or their potential liability. Ernst & Young sought a meaningful opportunity to participate in the settlement approval process by obtaining and presenting evidence concerning the merits of the case, the potential damages, the relative strength of the parties' positions, and the financial resources of the settling defendants, and asked the Superior Court to consider whether the settlement would improperly infringe on the rights of third parties such as Ernst & Young.

The Superior Court denied these requests. Instead, the court merely entered a conclusory order — drafted by DEPCO's counsel — approving the settlement as "fair and reasonable, made in good faith, and . . . in the best interests of the moving parties and the receivership estate" (App., *infra*, 26a), without any mention of whether the settlement adequately protected Ernst & Young's interests. The Rhode Island Supreme Court later affirmed, confirming that the Superior Court had properly interpreted and applied the Act as a matter of state law. *See Brown Settlement Appeal*, *supra*, at 4. By doing so, that court made clear that the Act does not afford the kind of meaningful opportunity to participate in the

approval process that Ernst & Young had sought, and that the federal cases cited above require as a matter of due process.

C. The Court Below Rejected The Contention That The Act Violated Due Process Based Upon The Federal Case Law.

The Rhode Island Supreme Court has the last word on the meaning of Rhode Island law. However, Ernst & Young contended in the court below, on the basis of the federal precedents, that because the Act's settlement approval process as interpreted by the trial court (and as later affirmed on appeal) deprived Ernst & Young of a meaningful opportunity to participate in the settlement proceedings, it violated Ernst & Young's federal right to due process. By failing to accept that contention, the court below deprived Ernst & Young of an important procedural right and, in doing so, brought itself into conflict with the federal court decisions noted above.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1995

APPENDIX

APPENDIX

1. Opinion of the Supreme Court of Rhode Island dated May 19, 1995

In re Advisory Opinion to the Governor
(Section 42-116-40 of DEPCO Act)

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION *et al.*

v.

Wilhelmina BROWN *et al.*, Ernst & Young *et al.*

Nos. 94-648-M.P., 94-668-M.P. (PC-94-5369)

Supreme Court of Rhode Island

May 19, 1995

OPINION

SHEA, Justice.

To His Excellency Lincoln Almond, Governor of the State of Rhode Island and Providence Plantations.

We have received from Your Excellency a request for our written opinion in accordance with article 10, section 3, of the Rhode Island Constitution on the following three questions:

> "1. Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?
>
> "2. Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitu-

tion or Article I, Section 2 of the Constitution of the State of Rhode Island?

"3. Whether the provisions of R.I. Gen. Laws Section 42-116-40 constitute an unlawful bill of attainder in violation of Article I, Section 10 of the [United States] Constitution?"

In addition, on September 29, 1994, plaintiffs Rhode Island Depositors Economic Protection Corporation (hereinafter "DEPCO") and Edward D. Pare, Jr., in his capacity as receiver for the Brown University Employees Credit Union, filed a complaint against certain former officers and directors of the Brown University Employees Credit Union alleging that the directors' negligence in the supervision, management, and operation of the credit union caused its failure and resulted in damages to plaintiffs. On October 14, 1994, defendants filed a third-party complaint for contribution and indemnity against Ernst & Young and certain of its present and former partners. On October 14, 1994, defendants filed a motion to certify questions on the constitutionality of G.L. 1956 (1993 Reenactment) § 42-116-40 (hereinafter "DEPCO Act") to this court pursuant to G.L. 1956 (1985 Reenactment) § 9-24-27.

On October 17, 1994 plaintiffs filed a similar motion and on the same day filed a motion seeking the Superior Court's approval, pursuant to the DEPCO Act, of a settlement that plaintiffs and defendants had reached. Despite an objection by third-party defendant Ernst & Young, the trial justice entered an order approving the settlement as fair, reasonable, made in good faith, and in the best interests of the moving parties and the receivership estate, and certified to this court pursuant to § 9-24-27 four essentially similar questions for determination. The questions transmitted by the Governor and those certified by the trial justice differ only in that the

certified questions also request this court's opinion with respect to whether the DEPCO Act constitutes a law impairing the obligation of contracts in violation of article 1, section 12, of the Rhode Island Constitution. We have consolidated these two proceedings and established a joint briefing schedule for the proponents and opponents of the constitutionality of the DEPCO Act. We are responding to the consolidated matters in the form of an opinion. Our findings shall therefore be legally binding.

Before addressing the questions presented, we feel that it is necessary to present a chronology of the facts and procedural history leading to the issues presented before this court. On January 1, 1991, former Governor Bruce Sundlun proclaimed a banking emergency and ordered the closing of the Rhode Island Share and Deposit Indemnity Corporation (hereinafter RISDIC) and the forty-five financial institutions and credit unions it insured, including Brown University Employees Credit Union. As a result of the closing of the credit unions a financial crisis ensued in which depositors were prevented from withdrawing their funds. In response to the resulting financial crisis, the Rhode Island General Assembly enacted emergency legislation establishing the Depositors Economic Protection Corporation, a public corporation obligated to repay depositors whose deposits had been frozen in the failed institutions. *See* G.L. 1956 (1993 Reenactment) chapter 116 of title 42. DEPCO was charged with the payment of the deposit liabilities of the insolvent financial institutions, the liquidation of their assets, and the pursuit of tortfeasors who contributed to the banking crisis. In addition, DEPCO served as the receiver for RISDIC. The DEPCO legislation also created an entirely new financial institution receivership law, as well as statutory priorities for prompt payment to people whose deposits were left uninsured due to the failure of RISDIC.

In the aftermath of the shutdown of RISDIC and its insureds, the State of Rhode Island established a special commission to investigate the credit union crisis. The commission found fault with former officers and directors of the failed institutions, certain large borrowers, the State Department of Business Regulation, the General Assembly and a governor of the State of Rhode Island who held office during that time. The commission assigned a great level of blame to RISDIC and those persons who occupied prominent positions in the RISDIC hierarchy. The commission also focused on the public accounting firm of Ernst & Young, which had provided accounting services to RISDIC and to many of its insureds, as among the parties deserving special mention.

On February 20, 1992, DEPCO filed a complaint against Ernst & Young in Rhode Island Superior Court charging Ernst & Young with negligence, negligent misrepresentation, and breach of contract. The DEPCO complaint seeks damages which allegedly resulted from the failure of Ernst & Young to properly audit and report the financial condition of the failed institutions. The complaint alleges that Ernst & Young issued unqualified (or insufficiently qualified) audit opinions to RISDIC and a number of RISDIC-insured institutions despite obvious patterns of pervasive lending irregularities.

In July of 1993, well after DEPCO initiated suit against Ernst & Young, the General Assembly amended the DEPCO legislation by passing the DEPCO Act, P.L.1993, ch. 85, § 1. The DEPCO Act provides in part:

> "Notwithstanding any provisions of law to the contrary, a person, corporation, or other entity who has resolved its liability to the Rhode Island Depositors' Economic Protection Corporation, the receiver of Rhode Island Share and Deposit Indemnity Corpora-

> tion or the receiver of any state-chartered financial institution in a judicially-approved good faith settlement shall not be liable for claims for contribution or equitable indemnity regarding matters addressed in the settlement. Such settlement does not discharge any other joint tortfeasors unless its terms so provide, but it reduces the potential liability of such joint tortfeasors by the amount of the settlement.
>
> "The provisions of this section shall apply solely and exclusively to settlement of liabilities to [DEPCO] * * *." Section 42-116-40.

Prior to the passage of the DEPCO Act, a non-settling defendant in a RISDIC case could, if found liable, seek contribution from all other joint tortfeasors, save only those who had entered settlements that explicitly released all claims against all potentially responsible parties for the settling tortfeasor's proportionate share of the overall liability. *See* G.L. 1956 (1985 Reenactment) chapter 6 of title 10 (hereinafter Uniform Contribution Among Joint Tortfeasors Act). In essence, the prior contribution law ensured that, if a joint tortfeasor were held responsible for (and paid) more than its ratable share of damages, it could seek contribution from other joint tortfeasors who had not paid their proportionate share of liability. However, under the DEPCO Act a tortfeasor who refuses to settle, but is later found liable at trial, may not bring an action against a settler for contribution. Rather, that tortfeasor may only deduct the full amount of any settlements by joint tortfeasors from the judgment against it.

Two weeks following the approval of the DEPCO Act by the General Assembly, Ernst & Young filed a declaratory judgment action in the Federal District Court for the District of Rhode Island seeking to declare the DEPCO Act unconstitutional. The District Court dismissed the complaint on ripeness and abstention grounds and the First Circuit subsequent-

ly affirmed on appeal. *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530 (1st Cir. 1995).

DEPCO subsequently negotiated the settlement agreement in the Brown University Employees Credit Union case in which the trial justice certified the questions before us. The determination of the constitutionality of the DEPCO Act is the linchpin of the settlement in the underlying cause of action and all future settlements in DEPCO litigation.

I

Equal Protection

> "Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?"

The Fourteenth Amendment to the United States Constitution guarantees to all persons within the jurisdiction of any state "the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Article 1, section 2 of the Rhode Island Constitution provides individuals with equal protection guarantees similar to those contained in the United States Constitution. *In Re Advisory from the Governor*, 633 A.2d 664, 669 (R.I. 1993); *Kleczek v. Rhode Island Interscholastic League, Inc.*, 612 A.2d 734, 738 (R.I. 1992).

In order to determine whether the DEPCO Act satisfies equal protection requirements, we begin with the principle that legislative enactments of the General Assembly are presumed to be valid and constitutional. *Kennedy v. State*, 654 A.2d 708, 712 (R.I. 1995); *Kass v. Retirement Board of the Employees' Retirement System of the State of Rhode Island*, 567 A.2d 358, 360 (R.I. 1989). In addition, the party challenging the constitutional validity of an act carries the

burden of persuading the court that the act violates an identifiable aspect of the Rhode Island or United States Constitution. *Brennan v. Kirby*, 529 A.2d 633, 639 (R.I. 1987).

When deciding if a statute complies with equal protection standards, we must examine both the nature of the classification established by the act and the individual rights that may be violated by the act. *Boucher v. Sayeed*, 459 A.2d 87, 91 (R.I. 1983). If a statute either infringes upon fundamental rights or results in the creation of a suspect classification, the statute must be examined with strict scrutiny. *Id.*; *see, e.g.*, *Zablocki v. Redhail*, 434 U.S. 374, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978) ("rigorous" or strict scrutiny is applied in analyzing a statute which infringed upon the right to marry); *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817, 18 L. Ed. 2d 1010 (1967) (freedom of choice to marry may not be restricted by invidious statutory racial discrimination). If an act employs a gender-based classification, it is subject to a middle-tier scrutiny in which the classification must be substantially related to the achievement of the statutory objective. *Craig v. Boren*, 429 U.S. 190, 204, 97 S. Ct. 451, 460, 50 L. Ed. 2d 397, 411 (1976). Lastly, purely economic legislation that does not disadvantage a suspect class or impinge upon a fundamental right passes constitutional muster if a rational basis exists for it. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313, 320 (1985).

The parties concede that the DEPCO Act does not infringe upon a fundamental right or result in the creation of a suspect classification. Therefore we will address the DEPCO Act as an example of economic legislation entitled to rational basis review. In fact, we have on several occasions analyzed DEPCO legislation as economic law and applied a rational basis analysis in reviewing it. *See In re Advisory Opinion to the Governor (DEPCO)*, 593 A.2d 943,

950-51 (R.I. 1991) (upholding constitutionality of DEPCO legislation using rational basis review); *In re Advisory Opinion to the Governor (DEPCO II)*, 593 A.2d 1356, 1360 (R.I. 1991) (same).

The proponents of the DEPCO Act contend that the DEPCO Act is rationally related to the legitimate purpose of resolving the economic consequences of the credit union crisis. They assert that the DEPCO Act provides a necessary incentive to settle claims, and they emphasize that encouraging settlements is a goal that this court has recognized as favored public policy. *Homar, Inc. v. North Farm Associates*, 445 A.2d 288, 290 (R.I. 1982). They claim that without this incentive, settlement of liability claims involving directors, officers, accountants, attorneys, appraisers, borrowers, and insurers of over a dozen failed financial institutions will be virtually impossible.

Ernst & Young asserts that although the DEPCO Act may well be designed to promote settlement, the state may not rely upon an illegitimate or invidious goal when distinguishing among similarly situated persons. *Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869, 883, 105 S. Ct. 1676, 1684, 84 L. Ed. 2d 751, 762 (1985); *Zobel v. Williams*, 457 U.S. 55, 65, 102 S. Ct. 2309, 2315, 72 L. Ed. 2d 672, 681 (1982). Ernst & Young cites *Boucher*, 459 A.2d at 94, to demonstrate that this court will find legislation unconstitutional even under the minimal standard of rational basis review.

In *Boucher*, we held that amendments to the state's Medical Malpractice Reform Act in the midst of a so-called "Medical Malpractice Crisis" failed to satisfy rational basis review under the equal protection clause because those amendments gave medical doctors and hospitals special treatment unavailable to other tortfeasors and treated medical

malpractice plaintiffs differently from other plaintiffs. *Id.* In a dispositive pronouncement in *Boucher* we stated, "[a]bsent a crisis to justify the enactment of such legislation, we can ascertain no satisfactory reason for the separate and unequal treatment that it imposes on medical malpractice litigants." *Id.* at 93.

In the matter before us, it is important to note that defendants in the RISDIC tort cases are insured under "defense-within-limits" or "wasting asset" insurance policies. Under these policies, the insureds' costs of defense, including attorneys' fees, expert witness fees, and other litigation expenses, are paid by the insurance companies and deducted from the policy limits as they are incurred, thereby reducing the amount of insurance coverage available to pay settlements or satisfy judgments. In the words of the First Circuit, "[t]he banks' collapse proved to be a depositor's nightmare but a lawyer's dream." *Ernst & Young*, 45 F.3d at 532.

We cannot ignore the reality of the situation before us. The possibility that the liability insurance of the failed credit unions may be depleted before any judgment is derived from protracted litigation is not out of the realm of possibility. This court is persuaded that encouraging payment of insurance proceeds to DEPCO in the form of settlements, instead of allowing them to be dissipated through payment of costs of defense of protracted litigation, is certainly a legitimate legislative objective.

In examining whether the DEPCO Act bears a rational relationship to this legitimate state purpose, we must determine whether the Legislature "could rationally conclude that [the DEPCO Act] would effectuate a resolution to a legitimate problem." *Power v. City of Providence*, 582 A.2d 895, 902 (R.I. 1990) (citing *Weinberger v. Salfi*, 422 U.S. 749, 777, 95 S. Ct. 2457, 2472-73, 45 L. Ed. 2d 522, 545-46

(1975)). The equal protection safeguard is offended only if an act "rests on grounds wholly irrelevant to the achievement of the State's objective," and "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-26, 81 S. Ct. 1101, 1105, 6 L. Ed. 2d 393, 399 (1961). Because we cannot conclude that the DEPCO Act is "wholly irrelevant to the achievement" of the state's objectives, we hold that the DEPCO Act is rationally related to legitimate public purposes and therefore must be sustained against an equal-protection challenge. We therefore hold that the DEPCO Act comports with the requirements of equal protection under both the United States and Rhode Island Constitutions.

II

Due Process

> "Whether the provisions of R.I. Gen. Laws Section 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, Section 2 of the Constitution of the State of Rhode Island?"

The Due Process Clause of the Fourteenth Amendment provides that "no state shall * * * deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Due process prohibits legislation that would retroactively unreasonably impair substantive rights, or "impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf v. USI Film Products*, U.S. , , 114 S. Ct. 1483, 1505, 128 L. Ed. 2d 229, 262 (1994). To comport with the requirements of due process, a statute may not retroactively abrogate a property interest unless that action is, at a minimum, justified

by a legitimate legislative purpose furthered by rational means. *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 730, 104 S. Ct. 2709, 2718, 81 L. Ed. 2d. 601, 611 (1984). Further, this court when confronted with a due process challenge to a retroactive statute, has traditionally held that the purpose of a statute must be such that, on balance, outweighs the unfairness of retroactivity. *Lawrence v. Anheuser-Busch, Inc.*, 523 A.2d 864, 870 (R.I. 1987); *Raymond v. Jenard*, 120 R.I. 634, 639, 390 A.2d 358, 360 (1978).

The first step in our analysis of whether the DEPCO Act is violative of due process is to determine if the Act is indeed retroactive in nature. The proponents of the constitutionality of the DEPCO Act assert that a cause of action for contribution accrues when a party pays more than his or her fair share of the liability, and not when the underlying tort occurs. *See, e.g., Coniaris v. Vail Associates, Inc.*, 196 Colo. 392, 395, 586 P.2d 224, 225 (1978) ("no cause of action [for contribution] accrues to a joint tortfeasor until there has been a judgment against him [or her] or a settlement of the claim"); *Pennsylvania Greyhound Lines, Inc. v. Rosenthal*, 14 N.J. 372, 382, 102 A.2d 587, 591 (1954) (contribution claim "accrues only on the payment by a joint tortfeasor"); *National Mutual Insurance Co. v. Whitmer*, 70 Ohio St. 2d 149, 152, 435 N.E.2d 1121, 1123 (1982) (contribution claim "accrues when a party has paid more than his [or her] share of the joint obligation"). Because Ernst & Young did not hold an accrued contribution or indemnity claim as of the statute's effective date, the proponents contend that the statute could not have acted retroactively upon any such claim.

The United States Supreme Court stated that in determining whether a statute is retroactive one must look to see "whether the [statute] attaches new legal consequences to events completed before its enactment." *Landgraf*, U.S. at ,

114 S. Ct. at 1499, 128 L. Ed. 2d at 255. In *Nelson v. Ptaszek*, 505 A.2d 1141, 1143 (R.I. 1986), we held that a right of contribution exists prior to payment of more than one's pro rata share of a judgment or settlement, and is a claim or cause of action that could be discharged by a general release. It is noteworthy that in *D'Onofrio Construction Co. v. Recon Co.*, 255 F.2d 904 (1st Cir. 1958), the First Circuit interpreted Rhode Island law holding that a cause of action for contribution exists if the event has already occurred out of which a common liability may be asserted to have arisen, and if the injured party has already commenced an action against one of the possible joint tortfeasors. *Id.* at 908-09.

In the case at bar it is evident that before the DEPCO Act was adopted, Ernst & Young held a claim for contribution against all potential tortfeasors arising out of their past actions concerning RISDIC and the credit unions. The DEPCO Act proceeded to eliminate this right as against tortfeasors who settle with DEPCO. In fact "[a] majority of the courts that have decided when a contribution cause of action arises have concluded that it arises when the underlying tort is committed." *Lightner v. Duke Power Co.*, 719 F. Supp. 1310, 1315 (D.S.C. 1989). Rhode Island stands with the majority and therefore, in accord with the reasoning of *Landgraf*, we hold that the DEPCO Act indeed has a retroactive effect.

We are also persuaded that Ernst & Young's pre-existing right to contribution is properly viewed as a property interest subject to the protections of due process. A cause of action, even one of uncertain value is indisputably "a species of property protected by the Fourteenth Amendment's Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 1154, 71 L. Ed. 2d 265, 273 (1982). The proponents of the constitutionality of the DEPCO Act urge this court to find that Ernst & Young did not

have a "vested" property right to contribution subject to due process protections at the time of the enactment of the DEPCO Act. We have recognized the concept of "vesting" as being merely conclusory and disfavored when considering due process challenges. *Raymond v. Jenard*, 120 R.I. at 638, 390 A.2d at 360 (quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 696 (1960)). According to Hochman:

> "from an analysis of the cases it becomes apparent that it is impossible to reduce the potentially infinite variety of situations in which the problem of retroactivity can arise to a single common denominator. However, it is just as clear that the factor most often appearing in these cases is the extent to which the parties have laid reasonable reliance on the law existing at the time of the conduct whose legal consequences the retroactive statute would alter. The importance of this element is apparent when one considers that in very general terms the two major factors to be weighed in determining the validity of a retroactive statute are *the strength of the public interest it serves and the unfairness created by its retroactive operation*, and the reliance of the parties on preexisting law is perhaps the most accurate gauge of the latter." (Emphasis added.) Hochman, 73 Harv. L. Rev. at 727.

The proponents of the DEPCO Act assert that it is ludicrous for Ernst & Young to argue that they relied on the prior contribution statute in committing negligent acts. In the case at bar, Ernst & Young asserts that they relied on the existing Rhode Island contribution system at the time it began its work for RISDIC and the credit unions. Ernst & Young argues that it considered its risks, including litigation risks, as part of its determination of whether to accept RISDIC and the

credit unions as clients. Its argument follows that if it had been aware that its work for RISDIC and the credit unions would be subject to different and harsher rules than its work for other Rhode Island clients, and that its litigation exposure could increase dramatically, it might well not have taken them as clients as it did.

We find this reasoning less than persuasive. It is highly unlikely that a sophisticated accounting firm would rely upon speculative joint tortfeasor contribution in deciding to perform negligent acts.

Although a statute has retroactive effect that implicates property rights, it does not necessarily follow that the statute is unconstitutional. *See Brennan v. Kirby*, 529 A.2d at 640-641 (upholding statutory denial of seniority rights provided to combat veterans); *Raymond v. Jenard*, 120 R.I. at 640, 390 A.2d at 361 (finding that public interest in applying comparative negligence outweighed unfairness because defendant could not have relied on contributory negligence rule in giving firecracker to minor). This court has traditionally employed a balancing test in cases involving retroactive statutes in which the court weighs the public interest in retroactivity against the unfairness created. The unfairness of a retroactive statute is "measured best by the party's reliance on the preexisting state of the law." *Brennan*, 529 A.2d at 640. If the unfairness outweighs the benefit, the statute lacks a rational basis. *Lawrence*, 523 A.2d at 870-71.

Ernst & Young argues that the DEPCO Act's alteration of the liability scheme represents a "naked exercise of governmental power far removed from the general economic or social legislation that is entitled to a presumption of constitutionality." Ernst & Young contends that a participant to a contest, such as DEPCO, does not have the right to

change the rules in the middle of a contest for no better reason than to advance its own position.

Ernst & Young argues that the Supreme Court of Virginia addressed the issue presented in the case at bar, holding that the retroactive abrogation of an inchoate cause of action for contribution violates due process. *Shiflet v. Eller*, 228 Va. 115, 319 S.E.2d 750 (1984). In *Shiflet*, the case presented a situation in which parties were involved in an automobile accident in 1977. *Id.* at 117, 319 S.E.2d at 752. In 1979, the Virginia Legislature enacted a statute, similar to the DEPCO Act, that barred non-settling parties from seeking contribution from settling parties, but provided for a pro tanto reduction in the non-settling parties' liability. *Id.* In *Shiflet*, the Supreme Court of Virginia, focusing on whether the right to contribution involves substantive or procedural rights, was persuaded that if any substantive right is involved, "then any statute affecting that right cannot be applied retroactively to a cause of action which accrued prior to enactment of the statute in question." *Id.* at 120, 319 S.E.2d at 753. The court concluded that the legislation affected the substantive right to contribution, and therefore was violative of due process. *Id.* at 123, 319 S.E.2d at 755.

We are not persuaded by *Shiflet*. Rhode Island jurisprudence in the area of due process challenges to retroactive legislation is characterized by a balancing test not evident in *Shiflet*. There is a great public interest in minimizing the taxpayers' liability for the depositor bailout. This legislation was adopted subsequent to a crisis of monumental proportions affecting the well-being of thousands of Rhode Island depositors. We agree that facilitating settlement of the DEPCO litigation in light of the depletion of the credit union insurance policies would ultimately relieve to some extent the taxpayers' cost of the bailout. Balancing this public interest against the alleged unfairness to Ernst & Young to be denied

its pre-existing right to contribution, we come to the conclusion that the State of Rhode Island's interest prevails. Therefore we hold that the DEPCO Act does not offend the Due Process Clause of the Fourteenth Amendment to the United States Constitution nor the Rhode Island Constitution.

III

Bill of Attainder

> "Whether the provisions of R.I. Gen. Laws Section 42-116-40 constitute an unlawful bill of attainder in violation of Article I, Section 10 of the [United States] Constitution?"

The United States Constitution provides in part that "[no] state shall * * * pass any bill of attainder." U.S. Const. Art I, § 10. A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of General Services*, 433 U.S. 425, 468, 97 S. Ct. 2777, 2803, 53 L. Ed. 2d 867, 907 (1977). The prohibition against bills of attainder was intended to safeguard against legislation penalizing a particular person or group by taking away life, liberty or property because the Legislature judged them guilty of conduct deserving punishment. *United States v. Lovett*, 328 U.S. 303, 317, 66 S. Ct. 1073, 1080, 90 L. Ed. 1252, 1260 (1946). Ernst & Young asserts that the DEPCO Act is a bill of attainder because, despite its general language, the Act seeks to punish Ernst & Young for its role in connection with the collapse of the RISDIC system by limiting Ernst & Young's contribution rights.

To determine whether a statute unconstitutionally inflicts punishment, the United States Supreme Court has established a three-part inquiry:

> "(1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, 'viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes'; and (3) whether the legislative record 'evinces a congressional intent to punish.'" *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841, 852, 104 S. Ct. 3348, 3355, 82 L. Ed. 2d 632, 643 (1984).

The denial of access to the courts, or prohibiting a party from bringing an action, has been defined as punishment by bills of attainder. *See, e.g., Pierce v. Carskadon*, 83 U.S. (16 Wall.) 234, 238-39, 21 L. Ed. 276, 277-78 (1873); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 320-21, 18 L. Ed. 356, 362 (1867) (denying confederate sympathizers any access to court held unconstitutional). However, the shifting of economic burdens so as to place a greater share on a particular party is generally not the type of punishment considered violative of the bill of attainder clause. *See Fresno Rifle and Pistol Club, Inc. v. Van De Kamp*, 965 F.2d 723, 728 (9th Cir. 1992); *United States v. Monsanto Co.*, 858 F.2d 160, 175 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L. Ed. 2d 1019 (1989) (holding that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) did not constitute an unlawful bill of attainder). In *Monsanto*, the Court of Appeals for the Fourth Circuit upheld the constitutionality of CERCLA in the face of bill of attainder challenges. The court held:

> "CERCLA does not exact punishment. Rather it creates a reimbursement obligation on any person judicially determined responsible for the costs of remedying hazardous conditions at a waste disposal facility. The restitution of cleanup costs was not

> intended to operate, nor does it operate in fact, as a criminal penalty or punitive deterrent." *Monsanto*, 858 F.2d at 174-75.

Likewise we hold that the DEPCO Act is intended to promote the settlement of claims, not operate as a criminal penalty.

The second element considers whether, viewing the Act reasonably and in light of the type and severity of the burdens imposed, the Act furthers a nonpunitive purpose. *Selective Service System*, 468 U.S. at 852, 104 S. Ct. at 3355, 82 L. Ed. 2d at 643. The proponents of the DEPCO Act contend that the Act is designed to promote settlements, decrease the amount and cost of litigation relating to the RISDIC collapse, thus saving the taxpayers of Rhode Island. Given the DEPCO Act's goal of encouraging settlements and saving the amount and cost of litigation, the statute could reasonably be said to further non-punitive legislative purposes.

Finally, the court must consider the argument that the Rhode Island General Assembly fostered an intent to punish Ernst & Young through the enactment of the DEPCO Act. "Judicial inquiries into [legislative] motives are at best a hazardous matter," when bill of attainder challenges are brought before the courts. *See Planned Parenthood, Inc. v. Wichita*, 729 F. Supp. 1282, 1290 (D. Kan. 1990) (quoting *Flemming v. Nestor*, 363 U.S. 603, 617, 80 S. Ct. 1367, 1376, 4 L. Ed. 2d 1435, 1448 (1960)). Even if there were comments by legislators that a specific person or class of persons was a target of the DEPCO Act, this alone would not be sufficient to prove that the DEPCO Act was a bill of attainder. *See Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987), *vacated in part, appeal dismissed*, 888 F.2d 230 (2d Cir. 1989). Neither the Legislature nor this court could accurately predict whether the DEPCO Act will work to the advantage or disadvantage of Ernst

& Young or any other party. Consequently no punitive motive can be discerned.

The Rhode Island General Assembly has no formal record of legislative history accompanying this or any other act it has ever passed. However, it is important to note that the bill of attainder clause is rarely used to invalidate legislation. The policy behind its sparing use is that:

> "[A]ll modern legislation regulating the economic activities of specific groups might be considered 'punishments,' and the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislatures to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem." *Cuomo*, 666 F. Supp. at 403.

The burden thrust upon Ernst & Young by the DEPCO Act is choosing whether to settle the case, or continue its defense, with the potential of increased exposure if DEPCO enters into settlement agreements with other joint tortfeasors. The burden faced by Ernst & Young is no different from the burden faced by other defendants in DEPCO suits. For these reasons and from a plain reading of the DEPCO Act, we do not find a legislative intent to punish Ernst & Young. Therefore, we hold that the DEPCO Act cannot be construed as an unlawful bill of attainder.

IV

Contract Clause

> "Whether the provisions of R.I. Gen. Laws § 42-116-40 * * * constitute a law impairing the obligation of contracts in violation of Article I, Section 12 of the Constitution of the State of Rhode Island?"

The United States and Rhode Island Constitutions provide that no "law impairing the obligation of contracts, shall be passed." U.S. Const., Art. I, § 10; R.I. Const. art. 1, § 12. In *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983), the United States Supreme Court announced the following three-part test to determine whether legislation unconstitutionally impairs the obligation of contracts. First, has the state law in fact substantially impaired a contractual relationship? *Id.* at 411, 103 S. Ct. at 704, 74 L. Ed. 2d at 580. Second, if the law constitutes a substantial impairment, can the state show a legitimate public purpose behind the regulation, "such as the remedying of a broad and general social or economic problem"? *Id.* at 411-12, 103 S. Ct. at 704-05, 74 L. Ed. 2d at 581. Third, is the legitimate public purpose sufficient to justify the impairment of the contractual rights? *Id.* at 412, 103 S. Ct. at 705, 74 L. Ed. 2d at 581.

At the outset, we see no contractual right that is impaired by this legislation. The Uniform Contribution Among Joint Tortfeasors Act, G.L. 1956 (1985 Reenactment) chapter 6 of title 10, as the common law that preceded it (wherein no contribution was provided among joint tortfeasors), arises out of the law of the state and not from any private agreement. We have previously stated in a contract clause challenge to DEPCO legislation that "even if we were to find an impairment of the contractual relationship, that impairment would be sufficiently justified by the legitimate public purpose of returning funds to deposit creditors and eventually to the Rhode Island economy." *In Re Advisory Opinion to the Governor (DEPCO)*, 593 A.2d 943, 949 (R.I. 1991). Likewise, in the controversy before us there is a legitimate purpose of returning funds to the public. Therefore the DEPCO Act is not a law impairing the obligation of contracts in violation of the State and Federal Constitutions.

For the foregoing reasons we are of the opinion that the DEPCO Act is constitutional. The questions transmitted by the Governor and the questions certified by the Superior Court are answered in the negative.

2. Transcript of Oral Decision of the Superior Court of Rhode Island on November 3, 1994

* * *

THE COURT: It is beyond peradventure that courts favor settlement among litigants. The Rhode Island Supreme Court, as a matter of public policy, has so stated. That public policy is particularly apt where, as here, the public itself has a direct, pecuniary interest in the litigation. After all, the proceeds obtained from this proposed settlement, if approved, are, in large part, to be used to help defray the taxpayers' ultimate burden which was eventually brought about by the 1991 banking crisis.

Thus, whenever extensive or protracted litigation can be obviated by settlement, thereby saving enormous judicial resources, and whenever that settlement will also redound and, indeed, is intended to redound to the financial benefit of the citizenry, such a proposed settlement would appear, at the very outset, to be on the right track.

Add to that, the fact that the settlement contemplates that the defendants' carrier will apparently pay virtually all of the insurance policy limits in order to resolve the dispute, and the significance of the settlement takes on a more impressive note. In addition, the settlement becomes even more attractive because the policy itself is a defense-within-limits type of policy, also known as a "wasting-assets" policy, so-called, which — if the case had to be tried or extensively litigated — could potentially be depleted or so diminished by the costs of defense as to leave the defendants without the wherewithal to

proceed to the end fully represented or, alternatively, to leave the plaintiffs without the wherewithal to recover their damages if they were successful.

Accordingly, this Court is of a strong mind to approve this settlement, absent some compelling reasons not to. The only objector — notwithstanding Mr. Kolb's *pas de deux* this morning — is Ernst & Young. Ernst & Young is an objector this morning. The papers say so, as do documents filed with the Court, which note the name Ernst & Young as objectors.

Ernst & Young is a third party defendant in this case. Ernst & Young claims that its position will be jeopardized in light of the subject statute, namely Section 42-116-40 of the Rhode Island General Laws, if the Court approves this settlement, and that therefore the Court ought not approve the settlement without more information to insure that the settlement is fair, reasonable and adequate.

Ernst & Young has the argument backwards, it seems to me. It is the operation of the statute about which Ernst & Young, in actuality and in reality, is complaining. That statute effectively prohibits indemnity or contribution suits against joint tortfeasors who settle with DEPCO. After all, if it weren't for that statute, Ernst & Young wouldn't be here this morning complaining, as they do, about this proposed settlement. It is the statute, not the settlement, which is really at issue here and which underlies Ernst & Young's motivation to delay this settlement.

For the reasons I have already alluded to, I have no reason to believe that this settlement should not be approved. Any notion that this settlement is somehow born of misguided collusion, or for lack of arms length negotiations between the settling parties is simply baseless. In fact, if intensity were palpable, it would be marked as Court Exhibit Number 1, as evidence of and testament to the heated and

exasperating written exchanges of dialogue to which I have been privy, by copies from the parties, during the past few years as efforts to resolve conflicts between the plaintiffs and the directors and officers from all of the various failed institutions — not just Brown University Employees Credit Union — became more and more strained.

This Court is absolutely satisfied that, based upon the tug-of-war history of these parties, a settlement which finally resolves all of those conflicts ought to be approved. Any suggestion that this proposed resolution is at this juncture somehow the result of collusion or bad faith is simply wrong.

Again, I repeat what I said earlier, it is really not the settlement which Ernst & Young cannot abide today. It is, in actuality, the operation of the statute which Ernst & Young finds unpalatable. Indeed, one need look only to the fact that over a year ago Ernst & Young specifically complained in federal court that the statute was unconstitutional. Thus far, that complaint has been rejected by two federal judicial officers. In fact, the federal district court judge who denied Ernst & Young's overtures said at page 13 of his memorandum decision, "Finally, interests of federalism favor abstention. The collapse of the RISDIC system had a profound effect on the State of Rhode Island. The General Assembly attempted to address the problem by passing the DEPCO legislation. This Court is loathe to consider the federal issues of a singular provision of a comprehensive state act, where that provision has not been interpreted or applied by the State."

Yet, Ernst & Young now seeks to prevent the certification to our State Supreme Court of the very issues which Judge Boyle indicated should be determined by that tribunal. That seems to me a rather anomalous position to take. Quite obviously, Ernst & Young does not concede the constitu-

tionality of the statute. Its efforts in the federal forum clearly reflect a contrary posture. The issue must be resolved. Its resolution by our State Supreme Court is the lynchpin of this proposed settlement. Indeed, so imperative is the Supreme Court's review of this portion of the statute that the Governor of Rhode Island himself has also sought the Supreme Court's opinion.

The fact that a federal suit has been filed scarcely divests this State's highest court from jurisdiction of deciding the constitutional issues. Indeed, as I already earlier mentioned, the federal district court abstained from offering its views for the very reason that the State's judicial branch had not yet ruled on this portion of the Act. The sentiments expressed by Judge Boyle at page 13 of his decision, which I read a moment ago, were renewed by him at page 17 wherein he said, "The validity of the DEPCO Act has not yet been determined by the Rhode Island judiciary . . . The facts of this case coupled with the ongoing state suit provide a strong basis on which to abstain."

Ernst & Young also suggests that certification be withheld until this court can somehow divine the General Assembly's intent in passing the statute. To the extent there exists any legislative history, which is highly unlikely, certification ought in no way to be denied simply because Ernst & Young believes the statute's legislative history might somehow be of interest. A similar overture was made by Ernst & Young to Judge Boyle, and it was abandoned when Ernst & Young apparently could provide no authority to counter the judge's remark that there is no legislative record in Rhode Island. In any event, this Court will not invite an evidentiary hearing so that Ernst & Young can somehow create or re-create legislative history after enactment of this statute.

A ruling by our Supreme Court on the constitutionality of this statute, which Ernst & Young has vigorously contested in every federal forum of the First Circuit, from the magistrate level upwards, is of penultimate importance. The Governor has requested an advisory opinion. The parties who intend to settle this action seek that Court's opinion. And, Ernst & Young — irrespective of its efforts to shun this State forum — will, in all probability, ultimately have to accept our State Supreme Court's opinion, because even if Ernst & Young persuades the First Circuit to remand the case to the District Court it would appear very likely, based upon comments made by the district court judge, that the federal court will itself certify the constitutional question to the Rhode Island Supreme Court.

In all, I am satisfied that the proposed settlement should be approved, that the questions identified by the parties should be certified to the Supreme Court of Rhode Island, and that an order staying further proceedings in this action in this Superior Court should be entered pending action by the Supreme Court. Mr. Carroll, Mr. Decof, if you have an appropriate order you wish to submit to me for purposes of memorializing my comments, I will accept it and sign it.

MR. DECOF: I will have to prepare one and have it for you this morning, Your Honor.

* * *

3. Order of the Superior Court of Rhode Island dated November 3, 1994

RHODE ISLAND DEPOSITORS ECONOMIC PROTECTION CORPORATION *et al.*

v.

Wilhelmina BROWN *et al.*, Ernst & Young *et al.*

C.A. No. 94-5369

Superior Court of Rhode Island

November 3, 1994

ORDER

This civil action was before the court, Mr. Justice Krause, on November 3, 1994, on plaintiffs' Motion for Approval of Settlement and on motions of plaintiffs and defendants for an order certifying questions to the Rhode Island Supreme Court, pursuant to R.I. Gen. Laws § 9-24-27, regarding the constitutionality of R.I. Gen. Laws § 42-116-40 of the Rhode Island Depositors Economic Protection Act (the "DEPCO Act") and for a stay of discovery or other proceedings. Upon consideration of the motions and arguments of counsel and for the reasons set forth in the court's decision issued on November 3, 1994, the motions are GRANTED and it is hereby ORDERED:

1. That this Court approves the settlement reached between plaintiffs and defendants, the Court having found that the settlement is fair and reasonable, made in good faith, and is in the best interests of the moving parties and the receivership estates.

2. That the following questions are certified to the Rhode Island Supreme Court pursuant to § 9-24-27:

a. Whether the provisions of R.I. Gen. Laws § 42-116-40 violate the Equal Protection Clause of the Fourteenth

Amendment to the United States Constitution or Article I, § 2 of the Constitution of the State of Rhode Island?

b. Whether the provisions of R.I. Gen. Laws § 42-116-40 violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article I, § 2 of the Constitution of the State of Rhode Island?

c. Whether the provisions of R.I. Gen. Laws § 42-116-40 constitute an unlawful bill of attainder in violation of Article I, § 10 of the United States Constitution or constitute a law impairing the obligation of contracts in violation of Article I, Section 12 of the Constitution of the State of Rhode Island?

3. That the clerk of this Court is directed to transmit to the Supreme Court the above-certified questions, together with the file and record of this action;

4. All proceedings and discovery in this case are stayed pending further action by the Supreme Court.

Entered as an order of this Court on this 3rd day of November, 1994.

PER ORDER:
s/ Joseph Maggiacomo
Deputy Clerk 11/03/94

ENTER:
s/ R.D. Krause
11/3/94

Presented by
Counsel for Plaintiffs
DECOF & GRIMM
One Smith Hall
Providence, R.I. 02903
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s/ Leonard Decof
Leonard Decof Bar #0688